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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

BRIEF OF GEORGE R. JOSLYN IN OPPOSITION TO PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG FOR CERTIORARI.

ALVIN GLEN HUBBARD,
REESE HUBBARD,
DOMINICK VARRAVETO, JR.,
Counsel for Respondent, George R. Joslyn.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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To the Honorable Justices of the Supreme Court of the United States:

We respectfully refer the court to the Statement of Facts and Propositions of Law in Joslyn's brief No. 445. The purported summary statement in the petition (Pet. 2-11) is incorrect. We respectfully refer the court to the opinion of the district judge (Tr. 365-371) to the Findings of Fact (Tr. 371-381). The testimony is not in the printed record. The findings of the referee (Tr. 127-183) were adopted by the judge (Tr. 384).

Because of his position as bankruptcy trustee, Young has a stay in the Court of Appeals. This stay under Sec. 25 b (U. S. C. Tit. 11, Chap. 4, Sec. 48) is without bond.

The opinion indicates that had the district judge suspected that Young would contrive by appeals with the attorneys for the Elks to keep Joslyn's affairs under the three suits and the injunctions he would have passed upon an application (Tr. 284-288) to remove Young:

> "Other matters, including a motion to remove the Bankruptcy Trustee, were filed in this cause, which need not be passed upon at the present time in order to dispose of this bankruptcy case and the other litigation which has grown out of it.
>
> "There is no conceivable objection to the payment in full of a bankrupt's creditors.
>
> "The payment, satisfaction and release of the stockholder's liability claim and the disclaimer of Marcellus L. Joslyn and Dr. Ralph C. Hamill leave this court with a bankruptcy case without creditors or claimants and with no justifiable reason for holding open this case except for the allowance and payment of claims for fees and expenses." (Tr. 368.)

Young Asserted in the District Court a Purported Equitable Lien Claim.

Young, the trustee, contended in the district court that the estate should be kept open in order that the attorneys for the Elks could assert a lien on the bankruptcy estate through two assignments of alimony and child support. This claim had been adjudicated to be part of a scheme to extort and to blackmail by the Illinois courts of last resort (*Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV).

The judge in his opinion both discussed and decided the merits of this alleged claim:

> "It is suggested by the Bankruptcy Trustee that an

equitable lien claim might be filed on behalf of Thomas Hart Fisher, but I fail to see how such a claim could possibly affect a settlement of this proceeding. Obviously, the alleged claim of Fisher arose long subsequent to the date of the original bankruptcy to which this entire proceeding relates. Furthermore, it is clear that Fisher's lien claim has been asserted exclusive of the jurisdiction of this Court; and there appears to be no occasion for litigating or re-litigating this same matter in this cause, or preventing settlement of this proceeding on the basis of such alleged claim to an equitable lien. In this connection, this Court's attention has been called to the case of *Joslyn* v. *Joslyn,* 337 Ill. App. 443, where the basis for Fisher's alleged lien claim was shown to consist of two assignments of alimony from his client, Charlotte C. Joslyn, the former wife of the bankrupt, said assignments being dated August 12, 1940 and April 8, 1941, respectively.

"Fisher's claim for attorney's fees, which the Bankruptcy Trustee states may be filed in this cause, was adjudicated adversely to Fisher in the Illinois Appellate Court case, and there has been no reversal of that ruling. It was there held, at page 477:

> 'This case presents flagrant abuses by Fisher of court processes, primarily in his own interest. He has been fully reimbursed for expenses and suit money. In the light of his conduct, he should not be awarded any fees.' " (Tr. 370.)

We have pointed out (Joslyn's brief No. 445, pp. 4-5) that the trustee Young asserted this so-called equitable lien before the referee. The referee found that the attorneys for the Elks had planned to assert a lien upon any funds which would be paid to Young (Tr. 154).

The Honorable Elwyn R. Shaw in an opinion filed February 9, 1945, in this case found that the reopening was for the purpose of blackmail:

> "The next move in this court came eight years after the alleged bankrupt had been discharged, and was obviously engineered by Thomas Hart Fisher as a

> sort of a legal blackmail in an effort to extort enormous fees from George R. Joslyn in connection with the old divorce case." (Rec. 4-7.)

While the Court of Appeals reversed Judge Shaw's order dismissing the entire reopening proceeding *In re Joslyn's Estate,* 171 F. 2d 159, the above-quoted finding has neither been rescinded nor set aside.

Note: Judge Shaw's opinion was in the record before the Court of Appeals but has not been printed. The above quotation, however, is also in *Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443 at 464, 86 N. E. 2d 367 at 377, appeal denied 341 Ill. App. XIV. Judge Igoe quoted from this opinion (Tr. 370). The Court of Appeals also referred to said opinion for a statement of the facts:

> "They (the facts herein) are also succinctly stated in the opinion of the Illinois Appellate Court in a matter which that court considered to be inseparably connected with the bankruptcy proceeding. See *Joslyn* v. *Joslyn,* 337 Ill. App. 443, 449, 457, appeal denied, 341 Ill. App. xiv." (Tr. 423-424.)

The Illinois Appellate Court on the same page with the above statement of Judge Shaw quoted the Honorable John P. Barnes upon one of the hearings in this case. Judge Barnes told Thomas H. Fisher that Fisher's purpose was to blackmail:

> "I haven't any doubt that for four or five long years it has been your purpose to blackmail and extort from them (the Joslyn family) money by means of this bankruptcy. I haven't the slightest doubt of it" and in another instance, "It now seems to me that you have been using the processes of this court in order to blackmail and extort. That is the way it looks to me." (*Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443 at 464, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV.)

The Purported Claim of New Jersey Equities.

On September 13, 1951 (Tr. 294), John S. Miller, Thomas H. Fisher, and Norman Crawford presented the Elks' petition to the Superior Court to vacate the decree of July 12, 1951 (Tr. 295-309). The court denied leave to file on September 20, 1951 (Tr. 294). New Jersey Equities' purported claim with a power of attorney to Norman Crawford and Thomas H. Fisher was executed ten days later—October 1, 1951 (Tr. 335-336). The final hearing in this case was held October 15, 1951 (Tr. 1, 3). This purported claim was withheld from record until October 15, 1951 (Tr. 334-335)—the day of the final hearing (Tr. 1, 3). Norman Crawford on October 11, 1951, served notice that he would present the fourth affidavit of bias and prejudice on October 15, 1951 (Tr. 337).

Note: The first affidavit of bias and prejudice was filed March 12, 1947, against the Honorable John P. Barnes by Thomas H. Fisher as attorney for the Elks (Tr. 15-25). The court granted the motion (Tr. 27). The second affidavit of bias and prejudice was filed February 11, 1949, by Horace Young against the Honorable Elwyn R. Shaw (Tr. 40). Judge Shaw refused to recuse himself. The third affidavit of bias and prejudice was filed May 3, 1950 by Horace Young (Tr. 48-54). Judge Shaw granted the motion (Tr. 65). The fifth affidavit of bias and prejudice was filed November 13, 1951, five days after the final decrees were entered on November 8, 1951 by Thomas H. Fisher, Norman Crawford, and John S. Miller, asking the court to vacate his ruling upon the fourth affidavit of bias and prejudice (Tr. 387). On the day of the filing of the fifth affidavit of bias and prejudice Young and Crawford without notice appeared before Judge Igoe. They asked Judge Igoe for a stay (Tr. 398-399). Although both counsel appeared before Judge Igoe on the day of filing the fifth affidavit attaching him, neither mentioned this affidavit (Tr. 398-399). The dates on the two affidavits attached to this fifth affidavit of bias

and prejudice are, respectively, November 9, 1951 (Tr. 397), one day after Judge Igoe had entered the final decrees and the other October 18, 1951 (Tr. 395). This affidavit was filed without leave.

The transcript shows the exhibits offered October 15, 1951 (Tr. 347-364).

This purported claim of New Jersey Equities was never mentioned upon any hearing before the court. No notice of its filing was ever given.

The findings named the bank creditors whose claims had been filed. New Jersey Equities' claim is not among them (Tr. 382).

New Jersey Equities alleges:

> "2. That George R. Joslyn, * * * was at and before the filing by him of the petition * * * and still is justly and truly indebted to said corporation through its predecessor in interest, New Jersey Fidelity & Plate Glass Ins. Co., in the sum of $2,828.89.
>
> "3. That the consideration of said debt is as follows: Said bankrupt owed a stockholder's liability of $57,100 on 1,142 shares of the capital stock of Chicago Bank of Commerce, * * * and claimant's predecessor in interest, New Jersey Fidelity and Plate Glass Insurance Company, was a depositor in said bank in said sum.
>
> "4. That no part of said debt has been paid, and no claim on account thereof was filed with the State Court Receiver of said bank and no dividend on account thereof paid by him.
>
> * * * * *
>
> "7. That the instrument upon which said debt is founded is attached hereto.
>
> "8. That the said debt was due on June 25, 1932, when said bank closed; * * * and that no judgment has been rendered thereon, except for proceedings in stockholders' liability case." (Tr. 335.)

The alleged instrument on which the debt is stated to be founded in the above paragraph 7 was not attached (Tr. 335-336).

No affidavit by the assignor was attached as required by General Order 21:

Tit. 11, U. S. C. A. 53:

"General Orders, 21.—Proofs of Claim.

* * * * *

"(3) If a claim has been assigned after the commencement of the proceedings but before proof of claim has been filed, the proof of claim therefor shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims."

The purported proof of claim shows no attempt to set out how and when the alleged assignee obtained title as required by Illinois statute:

"Ill. Civil Practice Act, Ill. R. S., Chap. 110, Sec. 146:

"146. Sec. 22. (Who may be plaintiff.) The assignee and owner of a nonnegotiable chose in action may sue thereon in his own name, and he shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title."

"*N. & G. Taylor Co.* v. *Anderson* (1928), 275 U. S. 431, 48 S. Ct. 144, 72 L. Ed. 354.

N. & G. Taylor Co. v. *Anderson* (1926, 7 Cir.), 14 F. 2d 353."

The alleged indebtedness against the bank admittedly did not accrue during the 4½ months—February 10 to June 25, 1932—George R. Joslyn was a stockholder. Under no

theory could New Jersey Equities Co. have any claim. Under Illinois law only creditors whose claims against the bank accrued while Joslyn was a stockholder have any interest in the fund arising from Joslyn's stock liability. (See findings and analysis by referee, Tr. 170-174.)

The two statements, one in paragraph 4, that no part of said debt had been paid and the other in paragraph 8 that judgment had been rendered thereon in the stockholders' liability case indicate the supposed claim of the predecessor in interest against the bank was invalid. The Illinois receiver appointed by the Auditor of Public Accounts had a statutory duty to prove all unproved claims appearing upon the bank's books:

> "The receiver of such bank shall, after the expiration of said twelve weeks, file with the Auditor and with the clerk of such court as may have charge of the liquidation, *a correct list of all creditors of said bank,* as shown by its books, who have not presented their claims and the amounts of their respective claims after allowing all just credits, deductions and set-offs as shown by the books of said bank. *Such claims so filed shall be deemed proven,* unless objections are filed thereto by some party or parties interested therein within such time as shall be fixed by the auditor or by such court as may have charge of the liquidation." (Emphasis ours.)
>
> Chap. 16½, Sec. 11, 1949 Ill. Rev. Stat. Laws 1929, P. 174, #1.

No attempt is made by this purported claimant to explain how or why the receiver failed to do his statutory duty to prove this purported claim if such claim ever existed.

PROPOSITION OF LAW.

If One Assume Contrary to the Pleadings and Proofs in This Case, That the Elks and the New Jersey Equities Owned an Indebtedness Which Accrued Against the Bank During the Four and a Half Months George R. Joslyn Was a Stockholder, February 10 to June 25, 1932, Still Under the Illinois Law, Such Creditors Would Not Have Any Standing to Prove a Claim in the Bankruptcy.

Zimmerman v. *Zeimer* (1936), 363 Ill. 220; 1 N. E. (2d) 854.

Leonard v. *Bye* (1935), 361 Ill. 185; 197 N. E. 546.

ARGUMENT.

If One Assume Contrary to the Pleadings and Proofs in This Case, That the Elks and the New Jersey Equities Owned an Indebtedness Which Accrued Against the Bank During the Four and a Half Months George R. Joslyn Was a Stockholder, February 10 to June 25, 1932, Still Under the Illinois Law, Such Creditors Would Not Have Any Standing to Prove a Claim in the Bankruptcy.

Hillmer, et al. v. *Chicago Bank of Commerce,* Superior Court No. 560305, on behalf of all creditors, was instituted on June 25, 1932. The court restrained all of the creditors from instituting any other suits. It appointed a receiver to receive payments from stockholders. George R. Joslyn was made a party defendant and served with process long before the bankruptcy (Tr. 272-273). Under Illinois law, a creditor whose indebtedness against the bank accrued during the four and a half months George R. Joslyn owned the stock had no standing in any court to institute a suit against George R. Joslyn.

This question was passed upon squarely by the Supreme Court of Illinois in *Zimmerman* v. *Zeimer* (1936), 363 Ill. 220; 1 N. E. (2d) 854. Zimmerman whose indebtedness against the savings bank accrued while Zeimer was a stockholder instituted the suit. The court held that the Superior Court could not entertain the proceeding. The court said:

> "To give the constitutional provision any other interpretation would afford individual creditors an undue and unfair advantage over those creditors who present their claims in the representative proceeding in equity. It would furnish opportunity for a stockholder to prefer one creditor over creditors generally, it would positively prevent the creation of a fund to be

distributed ratably among all creditors, as the constitution contemplates, and would result in serious confusion in the liquidation of insolvent banks. Such a condition was not intended by the framers of the constitution."

Zimmerman v. *Zeimer*, 363 Ill. 220 at 221-222, 1 N. E. (2d) 854.

In *Leonard* v. *Bye* (1935), 361 Ill. 185; 197 N. E. 546, the stockholder moved to dismiss the depositor's action on the ground that a class suit had been previously filed. Leonard, the creditor contended in the Supreme Court that he was not bound by the gratuitous acts of complainants in the representative suit. Holding that Leonard had no standing to institute any suit, the court said:

"There can be no doubt that circuit courts have jurisdiction over representative suits. In such suits the remedy is furnished to a class of individuals who have common rights, who need protection, and in pursuit of that remedy individuals have the right to represent the class to which they belong. The complainants in the suit purported to represent the appellant, who would be bound by the results in the case until the decree rendered there is reversed on appeal."

Leonard v. *Bye*, 361 Ill. 185 at 190; 197 N. E. 546.

Conclusion.

Petitioners have shown no ground for issuance of the writ of certiorari. The constitutional provision imposing liability upon bank stockholders has been repealed. All the claims have been paid. Any questions which at one time existed have become moot. We respectfully submit that the Petitions for Certiorari should be denied.

Alvin Glen Hubbard,
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Dominick Varraveto, Jr.,
Counsel for Respondent,
George R. Joslyn.

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ON PETITION OF NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF OF WADE FETZER, JR., ET AL., IN OPPOSITION.

The petitioners, New Jersey Equities Company and Horace A. Young, as Trustee in bankruptcy, have adopted the brief and argument in support of the petition of the Benevolent and Protective Order of Elks of the United States of America for writ of certiorari, pending as Docket No. 445. On December 15, 1952, respondents Wade Fetzer, Jr., *et al.*, filed a brief in opposition to the Elks' petition. No

new question is presented by the joint petition of the New Jersey Equities Company and Horace A. Young, as Trustee in Bankruptcy, or by their supporting brief. It seems appropriate, therefore, that the brief in opposition of respondents Wade Fetzer, Jr., *et al.*, should take the form of a memorandum with respect to the variant statement of facts and argument in the joint petition.

1. Petitioners assert that the creditors of the bankrupt fall into two categories—those who "participated" in the funds distributed in the state court proceedings and those who did not or will not participate, and that the New Jersey Equities Company "speaks" for the latter group. No such finding was made by either of the courts below nor by the referee. The court of appeals below noted that the petitioners made such *assertion* (Tr. 425), but nothing in the opinion indicates that the court agreed with this contention. The only support in the record for the statement that there are two groups of creditors of the Chicago Bank of Commerce and that one group did not or will not participate in the distribution effected in the state court is the Trustee's petition for injunctive relief (Tr. 268-279). This petition (Tr. 275-6) has no probative value. The answer of the respondents Wade Fetzer, Jr., *et al.*, to this petition specifically denied all such allegations (paragraphs 11 (e), (f), (g)), in the Trustee's petition (Tr. 312). No offer of proof was made by the Trustee in support of the allegation that there were two separate groups of creditors of the bank and that one group did not participate in the liquidating dividend. The controverted allegations of the Trustee's petition cannot be taken as proof (*Bakersfield Abstract Co.* v. *Buckley* (C. C. A. 9), 100 F. (2d) 530, 532).

2. The New Jersey Equities Company does not have an appealable interest. Its claim was filed without leave of court and without notice to anyone. The claim was not proved nor allowed for any purpose. It was filed on the

day that the District Court heard all of the pending matters and took the cause under advisement. None of the respondents ever learned of its existence until it was designated by petitioner as part of the record on appeal. The New Jersey Equities Company does not, therefore, have such an interest as entitles it to request a review of the action of the lower courts (*In re Milwaukee and Sawyer Building Corporation* (C. C. A. 7), 79 F. (2d) 478, 479; *In re Granada Apartments* (C. C. A. 7), 104 F. (2d) 970, 973, cert. denied 308 U. S. 607).

3. The New Jersey Equities Company was neither a creditor of the bankrupt nor a creditor of the Chicago Bank of Commerce. It claims as assignee of the New Jersey Fidelity and Plate Glass Insurance Company (Tr. 335-336). The claim does not show when the New Jersey Fidelity and Plate Glass Insurance Company assigned its claim against the Chicago Bank of Commerce to the New Jersey Equities Company. If the claim was assigned after the bankruptcy of Joslyn, the claim was required to be supported by an affidavit of an officer of the New Jersey Fidelity and Plate Glass Insurance Company, setting forth the true consideration for the assignment and whether or not it was secured (General Order XXI (3)). The claim of the New Jersey Equities Company is, therefore, a nullity.

4. Under the Illinois law a stockholder of an Illinois bank is liable only to the extent of the par value of his shares for the unsatisfied debts of the bank accruing during his period of stock ownership, and he is discharged by payment to the receiver in the representative suit of an amount equal to those debts by stockholders during that period (*Holderman* v. *Moore State Bank*, 383 Ill. 534, 542, 50 N. E. (2d) 741). The creditors in the stockholder liability case may for practical reasons consent to make distribution through the receiver appointed at the request of the Auditor of Public Accounts to liquidate the bank. It then becomes

such receiver's duty to distribute such funds ratably among the creditors of the bank (*Holderman* v. *Moore State Bank*, 383 Ill. 534, 543, 50 N. E. (2d) 741). The consent of Hillmer, *et al.*, on behalf of all of the creditors of the Chicago Bank of Commerce to distribute funds collected in the stockholder liability case in such manner is binding upon all such creditors, including the New Jersey Equities Company (*Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363-4; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, cert. denied, 266 Ill. App. XV; *Groves* v. *Farmers State Bank*, 368 Ill. 35, 48, 12 N. E. (2d) 618); The New Jersey Equities Company, as well as the Elks and all other creditors of the Chicago Bank of Commerce, participated in the state court proceedings through their class representatives, Hillmer, *et al.*

5. It is true that the trustee in bankruptcy, Horace A. Young, did not participate in the state court proceeding. It is *not* true that he never had any actual knowledge of the state court proceedings. On March 31, 1949, respondents Wade Fetzer, Jr., *et al.*, sought to intervene in the bankruptcy proceeding and by their notice and petition apprised the Trustee in bankruptcy of the stockholder liability suit and respondents' claim for reimbursement (Tr. 41-46). *Actually, the Trustee was apprised of the stockholder liability case when he was appointed Trustee,* for at that time Hillmer, *et al.*, had filed a claim on behalf of all of the creditors of the Chicago Bank of Commerce in the bankruptcy proceeding. The district court on June 1, 1948, dismissed the reopened bankruptcy proceeding because the court was of the opinion that the remedy of the Elks was in the stockholders' liability case. It was from this order that Horace A. Young, as Trustee, prosecuted the appeal which was decided in *In re Joslyn*, 171 F. (2d) 159, 160, 166. It is true, as petitioners assert, that no order was entered in the bankruptcy proceeding authorizing or di-

recting the Trustee in bankruptcy to participate in the state court proceeding. The reason no such order was entered is that the Trustee in bankruptcy never made application for any such order. If the Trustee did not wish to intervene in the state court proceeding which had jurisdiction of the subject matter of the stockholder's liability of George R. Joslyn, and of George R. Joslyn personally (subject to Joslyn's personal defense of a discharge in bankruptcy), the Trustee in bankruptcy cannot complain that orders were entered in the state court proceeding without notice to him. *Notice of the presentation of the settlement petition praying for the entry of the Superior Court order of July 18, 1951, was given to all persons entitled thereto as appears from the findings of the Superior Court order* (Tr. 348). Petitioners' statement that the state court judge clearly stated that he would not have entered the decree of July 18, 1951, if he had not been under the erroneous impression that all the attorneys interested in the matter were before him is plainly untrue. The stockholders' liability case was a class action. Notice to the plaintiffs in the stockholders' liability case was notice to all creditors of the Chicago Bank of Commerce (*Kape* v. *Home Bank and Trust Co.*, 370 Ill. 170, 172, 18 N. E. (2d) 170).

6. Petitioners argue that at the time of the entry of the order of July 18, 1951, the bankrupt had not withdrawn his defense of discharge in bankruptcy. As pointed out in our reply to the Elks' petition for certiorari, the intent of the bankrupt to waive his discharge in bankruptcy or to renew his debt by a new promise was inferable by his silence when his attorney presented his father's petition offering to pay the liability of the bankrupt if it were promptly adjudicated (*Dimock* v. *Revere Copper Company*, 117 U. S. 559, 566; *In re Innis* (C. C. A. 7), 140 F. (2d) 479, 481, cert. denied, 322 U. S. 736).

7. It is argued by petitioners that the order of July 18,

1951, was not a judicial decree but merely an agreement of the consenting parties judicially recorded. The mere fact that the order was okayed by the counsel for all of the parties did not alter the fact that it was an adjudication (*St. Louis B. & S. Ry. Co.* v. *Gray*, 100 Ill. App. 538, 539). The Superior Court trial judge actually made an independent examination of the authorities to determine whether interest was collectible and concluded that interest was not collectible (Tr. 390).

8. The reason relied upon by petitioners for the allowance of a writ of certiorari is that the decision of the court below was a relinquishment of its exclusive control of the administration of the bankrupt estate. This argument assumes that the state court did not have jurisdiction to adjudicate the liability of Joslyn as a stockholder of the Chicago Bank of Commerce. As we pointed out in our brief in opposition to the Elks' petition for the allowance of a writ, the Superior Court had jurisdiction to adjudicate the liability of the stockholders of the Chicago Bank of Commerce to the creditors of that bank in a class action brought by Hillmer, *et al.*, and the state court also had jurisdiction of the person of George R. Joslyn by reason of his appearance and answer in that case (Tr. 186, 354-356). The jurisdiction of the state court was not divested by the subsequent bankruptcy proceeding (*Dimock* v. *Revere Copper Company*, 117 U. S. 559, 564-6). The bankrupt's defense of his discharge in bankruptcy was a personal one which he could waive. And he did waive his defense by his silence when his own attorney presented the father's petition offering to settle the bankrupt's stockholders' liability if it were promptly adjudicated (*In re Innis* (C. C. A. 7), 140 F. (2d) 479, 481, cert. denied, 322 U. S. 736). The subsequent adjudication by the state court merged the stockholder's liability of the bankrupt in the Superior Court decree of July 18, 1951. When the decree was satisfied in open

court the decretal liability was extinguished. When the liability was extinguished it no longer afforded a basis for a claim against the bankrupt estate.

9. The extinguishment of the claim of the creditors of the Chicago Bank of Commerce to enforce the stockholder's liability of Joslyn left the bankruptcy estate without any creditors (Tr. 380). The decree of the district court provided for a fund of $50,000.00 to take care of the fees of the Trustee and the attorneys. Neither the Trustee nor the other petitioners claim that $50,000.00 is insufficient for such purpose. What good purpose could be fulfilled by continuing the three plenary actions to collect administrable assets totaling $500,000.00 is difficult to perceive. The court will not be oblivious to the realities. The contention of petitioners that the release of such assets permanently harms the bankruptcy administration is difficult to take seriously, particularly in view of the factual background set forth in *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 457, 464, 86 N. E. 2nd, 367, 374, to which attention was called by the court below (Tr. 424). The exercise of the court's discretionary power to terminate a bankruptcy proceeding when the bankruptcy estate "is without creditors or claimants" (Tr. 368, 383) does not limit or restrict the paramount and exclusive jurisdiction of the bankruptcy court over bankruptcy matters. To do what is obviously to the best interest of the bankrupt's estate under such circumstances is an exercise of such jurisdiction.

10. Petitioners devote much attention to *Brown* v. *O'Keefe*, 300 U. S. 598. That case was not the basis for the decision of the court below. The case was merely referred to by the court below in a discussion of its previous rulings. The court observed in effect that the claim of a receiver of a national bank is similar to the claim of a representative of all the creditors of an Illinois state bank and that the receiver appointed by the Comptroller in the

Brown case and the receiver appointed by the Superior Court in the present case are comparable in the sense that they are the only persons to whom payment can be made to discharge the liability of the stockholders.

11. The opinion of the court below upheld the district court on the theory that the district court was vested with and exercised the discretion of a chancellor in approving the final settlement of the bankrupt's stockholders' liability in the state court and in terminating the bankruptcy proceeding on the basis of that settlement (Tr. 424). The district court had the power and discretion to order the parties to proceed in the Superior Court stockholders' liability case to establish by a decree in that case the bankrupt's liability on his stock of the Chicago Bank of Commerce as recommended by the Referee (Tr. 176-7) (*Nathan* v. *Labor Board,* 344 U. S. 25, 30). If the district court could permit such remission initially it could subsequently accommodate itself to the adjudication by ratification. Contrary to the repeated contentions of petitioners, the bankrupt's liability as a stockholder was not liquidated prior to the Superior Court decree of July 18, 1951. Under the Illinois law the bankrupt was liable only for the debts of the Chicago Bank of Commerce which accrued while he was a stockholder *and only to the creditors whose claims accrued in that period.* In *Holderman* v. *Moore State Bank,* 383 Ill. 534, 540, 50 N. E. (2d) 741, 745, the Illinois Supreme Court said:

> The correct rule of liability is set out in *Golden* v. *Cervenka, Sanders* v. *Merchants' State Bank* and *Burket* v. *Reliance Bank & Trust Co.* With this measure of liability thoroughly established it would be inaccurate to say a stockholder is liable to any other creditor of the bank than one whose debt accrued while he is a stockholder, and to say that such stockholder is liable to all of the creditors of the bank would render him responsible to creditors who existed both before and after the time he was a stockholder, which is

directly contrary to the established rule of a stockholder's liability.

The Referee found that no proof had been made in the bankruptcy proceeding that either the Elks or any other claimant had claims against the Chicago Bank of Commerce which accrued while the bankrupt was a stockholder and that to hear the evidence on the question of which of the bank's creditors are also creditors of the bankrupt and how much of the bank's debts accrued during the period Joslyn was a stockholder and remained unpaid when the bank closed would mean hearing and determining virtually all the issues which had already been tried in the representative creditors suit in the state court (Tr. 175). If Joslyn's father had not presented his settlement petition in the Superior Court and the district court had acted upon the Referee's recommendation and remitted the issues on the stockholders' liability to the Superior Court for adjudication in the stockholders' liability case the Superior Court would have entered a decree against the bankrupt in precisely the same amount and directing payment to the receiver in the stockholders' liability case. The $57,100.00 recovered by the receiver under such a decree would *eo instante* have been impressed with the trust created by the prior Superior Court decree of February 14, 1950 (Tr. 187-211) which provided that the receiver should hold any and all money thereafter received by him in trust for the use and benefit of Wade Fetzer, Jr. and the other stockholders who had overpaid their liabilities as stockholders until their overpayments were repaid in full (Tr. 205). The court of appeals below obviously concluded that the district court had a discretionary power to remit the issues pertaining to the stockholder's liability of the bankrupt to the Superior Court and that, therefore, there could be no abuse of its discretionary powers in chancery to approve the method of such adjudication which it had the right to initiate and which, as the referee had pointed out (Tr.

175-7), had the compelling utility of providing for a just and equitable result.

12. The theory adopted by the court of appeals below in sustaining the decree of the district court is different from the one advanced by respondents Wade Fetzer, Jr., *et al.*, previously outlined and set forth more at length in our reply to the petition of the Elks. Both theories are applicable. Both produce the same result. The state court had jurisdiction to enter the decree of July 18, 1951, and the district court did not relinquish its exclusive jurisdiction over bankruptcy matters in entering its decree of November 8, 1951.

13. This memorandum has been confined to consideration of whether the court below reached the correct result. While the answer to that question is not normally dispositive of the question now before this Court, the inquiry in this case is of more than usual relevancy. So far as we have been able to determine the only ground on which the petitioners are seeking a review is that the decision of the court of appeals below is erroneous. No conflict of decision has been presented. Nor does it appear that the case is of a peculiar gravity or of general importance. Petitioners state that the decision below is in conflict with the clear language of the Bankruptcy Act and the numerous decisions of this Court. But so far as we can ascertain they have no other than a woman's reason: They think it is so because they think it is so.

For the foregoing reasons the petition of the New Jersey Equities Company and Horace A. Young, as Trustee in Bankruptcy, for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. METZDORF,
Pro se and as counsel for
Wade Fetzer, Jr., et al.

January, 1953.

Office - Supreme Court, U.S.
FILED
JAN 15 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 501

IN THE MATTER OF GEORGE R. JOSLYN, BANKRUPT.

NEW JERSEY EQUITIES COMPANY AND HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY,
Petitioners,

vs.

GEORGE R. JOSLYN, ET AL.,
Respondents.

BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Petitioners,

vs.

GEORGE R. JOSLYN, ET AL.,

Respondents.

BRIEF OF ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinions of the lower courts are reported in 198 F. (2d) 673 and 102 F. Supp. 521. They also appear in the Transcript of Record at pages 422-26, 511-12 and 365-71.

Correction of Summary Statement of Additional Matters.

Although the petition of the New Jersey Equities Company and the Trustee in Bankruptcy adopts "in all respects" the petition of the Benevolent and Protective Order of Elks of the United States of America, docketed as #445,

and purports to state only "certain additional facts and certain additional argument" (p. 2), said petition covers much the same ground as the prior petition of the Elks.

The principal new matters referred to in the Summary Statement of Additional Matters relate to (1) a description of the New Jersey Equities Company as a *creditor* of the bankrupt, and (2) the classification of the creditors of the Chicago Bank of Commerce into "participating" and "non-participating" groups. The record, however, does not support petitioners' claim with respect to either of these additional matters.

(1) The New Jersey Equities Company is described as "a substantial creditor" of the bankruptcy estate (Pet'n. 2). The claim of said petitioner shows on its face that it is derivative through an assignor, who was a depositor in the Chicago Bank of Commerce in which the bankrupt owned 1,142 shares of stock of a par value of $50 per share (R. 335). The method by which the liability of said stockholder was adjudicated and satisfied in the stockholders' liability suit in the state court is fully described on pages 2 and 3 of respondent's answer to the prior Petition for Certiorari, docketed as #445 to the October 1952 term of this Court, to which reference is hereby made. It is to be noted that said action of the Superior Court of Cook County did not affect the proceedings in bankruptcy herein except to prevent creditors of the Chicago Bank of Commerce from claiming that the stockholders' liability of George R. Joslyn had not been satisfied and released (R. 348-53, 357-58). Suffice it to say at this time that the stockholder's liability of George R. Joslyn to the New Jersey Equities Company has been fully satisfied and released and that said petitioner is not now a creditor of said George R. Joslyn.

(2) Similarly, the classification of creditors into "participating" and "non-participating" groups (Pet'n. 2-6)

is not supported by any order or decision of the lower courts herein and is inconsistent with the basic theory of representative or class suits—in which all members of the class share in recoveries thereby effected (R. 173). The findings and conclusions of the Referee in Bankruptcy, the trial judge and the Court of Appeals in this case uniformly recognize the *representative* character of the stockholders' liability suit in the state court and the right of all creditors to share ratably in the collection of the stockholders' liability (R. 173, 380, 382, 423, 425). Nothing in this record supports the separation of said creditors into different groups, as suggested by petitioners, and the argument based upon petitioners' artificial classification should be ignored.

Other misstatements and unwarranted distortions of fact are contained in petitioners' Summary Statement of Additional Matters. For example, it is baldly stated, on page 3, that prior to July 18, 1951, petitioners had no "actual knowledge" of the proceedings in the state court. This is patently and demonstrably untrue. After the reopening of the bankruptcy in 1946, the existence and status of the stockholders' liability suit in the Superior Court of Cook County is spread throughout the record in the bankruptcy court (R. 3-4, 14, 36, 41-46, 67-69, 77, 82, 87, 92-100, 107-17, 120-26, 128, 130, 133-37, 144-46, 158-59, 169, 176, 183-86, 187, *et seq.*, 230, 234-36).

Prior to July 18, 1951, the petitioner Horace A. Young, as Trustee in Bankruptcy, referred to and based arguments upon said state court proceedings in pleadings filed in the bankruptcy court (R. 77, 82, 87, 107-17, 130, 230, 234-36). In 1948—at a time when said trustee claims to have been without knowledge of the state court proceedings—said trustee was the appellant in a prior appeal in this case in which the state court proceedings were fully considered (*Young* v. *Joslyn, et al.*, 171 F. (2d) 159, 166-67). Equally aware of the stockholders' liability suit in the state court

was Thomas Hart Fisher, Esq. (R. 75, 92-106), one of the attorneys for the New Jersey Equities Company (R. 336, 413-14), who was also the attorney for the Elks (R. 13, 90-91, 106). This record completely disputes the claimed ignorance of petitioners relating to the stockholders' liability action in the state court prior to July 18, 1951.

It is not correct to say, as do petitioners on page 4, that "George R. Joslyn, having obtained his discharge in bankruptcy on June 29, 1936, asserted said discharge at all times thereafter as a valid defense to his stockholder's liability in the State Court proceeding." Joslyn's discharge in bankruptcy was removed as a bar in the state court action by the reopening of the bankruptcy on May 20, 1946 (R. 2), and was not thereafter relied upon by him as a defense (R. 67-69, 348-53).

Nor did counsels' approval of the order determining and satisfying Joslyn's liability as a stockholder destroy the judicial character of that adjudication. This record clearly shows that Judge Hoffman "took a lot of time" in deciding the matter (R. 389), that he conferred with other judges about it (R. 390-91), that he didn't take the "word of any of the lawyers as to what the law was" but "checked it" himself because he "wanted to be sure" (R. 390), and that he required the signatures of the attorneys only for his "own protection" (R. 393). Under these circumstances, the order determining and satisfying Joslyn's liability was a judicial determination of the matter and represents far more than an agreement by the parties to the litigation. It was *not* a "consent decree" in any accepted sense of the term.

On page 5 petitioners repeat the argument in the prior petition that interest was due on the claims of creditors of the bankrupt. This is the fundamental premise upon which both petitions are based and is adequately answered

in the final portion of this respondent's answer to the prior petition (Docket #445) where the relevant authorities are cited and discussed. The law is well settled that interest is not a part of bank stockholders' liability in Illinois and that the *maximum* amount for which a stockholder in an Illinois bank is liable is the par value of the stock owned by him. This was precisely the amount paid to the receiver in the stockholders' liability suit involved herein. Said payment of $57,100 constituted a complete satisfaction and discharge of the stockholder's liability of George R. Joslyn, and thereupon, as described by the trial judge, this bankruptcy became "a bankruptcy case without creditors or claimants" (R. 368, 380, 383). Academic discussions of whether bankruptcy creditors are entitled to interest are utterly meaningless in a situation—like the present—which involves a solvent bankrupt without creditors.

Since the stockholder's liability of the bankrupt has been satisfied and discharged, the argument in the final portion of the petition (pp. 6-9) to the effect that the decree herein "permanently harms the bankruptcy administration and the bankruptcy creditors" is obviously unsound. The only purpose for continuing the bankruptcy herein would be to permit the trustee to take physical possession of the estate of George R. Joslyn and—after paying fees, costs, and expenses of administration—to return the property to the solvent bankrupt. This same result is accomplished by the decree of the trial court herein, which expressly "reserves jurisdiction of George R. Joslyn for the purpose of adjudicating and enforcing against George R. Joslyn any and all claims for fees, costs and expenses that he may be ordered to pay by this Court in this proceeding" (R. 386). The choice between these two methods of paying fees, costs and expenses of administration of a solvent estate is not of such vital importance or of so great public interest as to warrant the granting of certiorari herein.

Question Presented.

The basic question underlying this case is whether the Superior Court of Cook County, Illinois, in the stockholders' liability suit therein pending had *jurisdiction* to adjudicate and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. If said state court had jurisdiction, then the liability of the bankrupt has been satisfied by payment, and the New Jersey Equities Company—as well as every other depositor of said bank—has ceased to be a creditor of the bankrupt.

No Grounds Exist for Allowance of Certiorari.

Petitioners seek allowance of certiorari on the grounds that the decision of the Court of Appeals violates fundamental principles of bankruptcy law and is in conflict with the Constitution and laws of the United States and the decisions of other Courts of Appeals. As hereafter demonstrated, none of these contentions are sound.

ARGUMENT.

Since petitioners have adopted the brief and argument attached to the petition of the Elks, heretofore docketed as #445 to the October 1952 term (Pet'n 2, 12), the court should carefully consider this respondent's answer to said petition in determining whether certiorari should be granted herein. We shall not repeat the arguments contained therein except to the extent necessary to answer arguments contained in the present petition of the New Jersey Equities Company and the Trustee in Bankruptcy.

At the outset attention should be focused on the question of whether the action of the trial court in providing for payment of fees and expenses and in terminating "a bankruptcy without creditors or claimants" (R. 368, 386-87) is so unreasonable and of such public importance as to warrant review by certiorari. In this connection, it is well to remember that this court has repeatedly held that the issuance of writs of certiorari "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258, and cases therein cited.

Respondent believes that even if this court should be of the opinion that the method suggested by petitioners for paying fees and expenses of the bankruptcy is preferable to the method adopted by the trial court, the slight difference between these two methods is not sufficiently great or of such public interest as to justify the issuance of the writ herein.

I.

THE STATE COURT HAD JURISDICTION TO ADJUDICATE AND SATISFY THE STOCKHOLDER'S LIABILITY OF GEORGE R. JOSLYN.

Despite protestations to the contrary, the principal question involved herein is whether the Superior Court of Cook County had jurisdiction to adjudicate and satisfy the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce. If it did, no depositor in said bank could thereafter enforce any claim against said stockholder based upon a depositor-creditor relationship. Since this is precisely the position in which the New Jersey Equities Company and the Elks find themselves, it is obvious that the extent of the jurisdiction of the state court becomes extremely important herein.

A. A class suit in the Superior Court of Cook County was the proper method of enforcing the stockholder's liability of George R. Joslyn.

The Constitution and statutes of Illinois create the liability which is the basis of the claim of the Elks and the New Jersey Equities Company as petitioners herein. See the Illinois CONSTITUTION, Art. XI, § 6 and the BANKING ACT of Illinois, § 6 (Ill. Rev. Stat. (1951) Chap. 16½, § 6).

It has long been established by statutes and court decisions in Illinois that the proper method of enforcing the liability of stockholders in Illinois banks is by a class suit for the benefit of all creditors of the bank. BANKING ACT OF ILLINOIS (Ill. Rev. Stat. (1951) Chap. 16½, § 11); *Heine* v. *Degen*, 362 Ill. 357, 365-6; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, 151-3; *Elkin* v. *Diversey Tr.*

& Svgs. Bank, 363 Ill. 160, 164-5; *RFC* v. *Central Republic Trust Co.,* 11 F. Supp. 976, 983-4 (D. C. Ill.).

The class suit filed by this respondent in the Superior Court of Cook County was an action of the character recognized in Illinois as proper for the enforcement of stockholders' liability. *Hillmer* v. *Chicago Bank of Commerce,* 375 Ill. 266.

B. Prior to the bankruptcy herein the Superior Court of Cook County acquired and retained jurisdiction over the person of George R. Joslyn and the subject matter of his stockholder's liability.

In 1932—more than four years prior to the bankruptcy proceedings herein—the Superior Court of Cook County acquired jurisdiction over the person of the bankrupt and the subject matter of his stockholder's liability (R. 373, 375-76, 348-49). At the same time, the court appointed a receiver to receive the amounts due from stockholders and enjoined all creditors of said bank from seeking to enforce this liability elsewhere (R. 183-86). Said injunction is still in force (R. 350, 97-98).

Both the state court and the trial court herein have found as a *fact* that the Superior Court of Cook County obtained and retained jurisdiction to determine the stockholder's liability of George R. Joslyn (R. 348-53, 375-76).

That the subsequent bankruptcy of the defendant Joslyn did not *ipso facto* destroy the power of the state court to proceed to judgment in the action to enforce stockholders' liability is evident from the decisions of this court in *Connell* v. *Walker,* 291 U. S. 1, 5-6, *Dimock* v. *Revere Copper Co.,* 117 U. S. 559, 564, and *Norton* v. *Switzer,* 93 U. S. 355, 362 and numerous cases therein cited.

C. Neither of the petitioners herein took any action to stay the stockholders' liability suit in the state court.

Petitioners *admit* that they never participated in the state court proceedings prior to the satisfaction of Joslyn's stockholder's liability on July 18, 1951 (Pet'n 3). This is a true statement of fact and is fatal to much of petitioners' argument for reversal of the action of the trial court herein.

In a desperate effort to overcome the obvious effect of inaction on their part, petitioners claim that they did not have "any actual knowledge of" the state court suit until "a few days before September 11, 1951" (Pet'n 3-4). As previously pointed out, this claimed ignorance on the part of petitioners is utterly false.

The Trustee in Bankruptcy, who is acting as his own attorney herein, described and referred to the state court suit in at least three separate pleadings filed by him in the bankruptcy court prior to the settlement of the liability of George R. Joslyn on July 18, 1951 (R. 77-89, 107-17, 234-36). He was both *party* and *counsel* in a prior appeal wherein the court fully considered the state court proceedings (*Young* v. *Joslyn*, 171 F. (2d) 159, 166-67).

Similarly, Thomas Hart Fisher, Esq., one of the attorneys for the petitioner New Jersey Equities Company (R. 336, 413), has also been an attorney for the Elks ever since reopening of the bankruptcy in 1946 (R. 13, 90-901). Said attorney was necessarily cognizant of the stockholders' liability suit in the state court when he filed the answer of the Elks to the intervening petition based upon said stockholders' liability suit (R. 104, 106).

The failure of petitioners to take appropriate action to stay proceedings in the state court should now preclude them from complaining about the adjudication by the state court and the satisfaction therein of the liability of George R. Joslyn as a stockholder of the Chicago Bank of Commerce.

II.

THE ACTION SOUGHT TO BE REVIEWED HEREIN IS A PROPER EXERCISE OF THE DISCRETION OF THE BANKRUPTCY COURT.

Petitioners urge review by certiorari because, they say, the trial court's approval of the action of the state court was a relinquishment of the *paramount* and *exclusive* jurisdiction of the bankruptcy court. This argument is predicated on the fallacy that bankruptcy courts are devoid of all discretion and that all matters affecting bankrupts *personally*—as well as their property—must be tried and determined only in the bankruptcy court. Such is not the law—as will appear from an examination of *Callaway* v. *Benton,* 336 U. S. 132, and other decisions of this court hereafter cited.

A. Bankruptcy courts are inherently courts of equity and, as such, are vested with discretionary powers.

This court in *U. S. National Bank* v. *Chase National Bank,* 331 U. S. 28, said:

> "It has long been established that 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' " (Citing cases.) p. 36.

See also Sec. 2 of the Bankruptcy Act (11 U. S. C. A. § 11).

Respondent submits that a court of equity *without discretionary powers,* as contended for by petitioners, is judicially incomprehensible.

B. The Bankruptcy Act does not limit the discretionary power of the bankruptcy court in the situation presented by this record.

Numerous provisions of the Bankruptcy Act necessarily require the exercise of *discretionary* powers in order to effectuate the purposes of the act. Thus, Section 11(b) and (c) (11 U. S. C. A. § 29) invests the bankruptcy court with discretionary power to determine whether a trustee in bankruptcy should prosecute or defend litigation pending in other courts. Similarly, Section 63(b) (11 U. S. C. A. § 103) expressly vests in the bankruptcy court full discretion to authorize the liquidation of claims against the bankrupt "in such manner as the court shall direct."

It is particularly noteworthy that, although other provisions of the Act also require the exercise of discretionary powers, petitioners herein have failed to cite a single section of the Act which prohibited the trial court from entering the order sought to be reviewed.

C. The concept of "paramount and exclusive jurisdiction" is not inconsistent with the exercise of "discretionary power" by the bankruptcy court.

Petitioners base much of their argument (pp. 12-14) upon the theory that the terms "discretionary power" and "paramount and exclusive jurisdiction" are **mutually exclusive** (Pet'n 12). That such is not the law is clear from the decisions of this court in *Callaway* v. *Benton*, 336 U. S. 132, *Nathanson* v. *N.L.R.B.*, 344 U. S. 25, and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

In *Callaway* v. *Benton* this court said:

> "We have held that a court of bankruptcy has exclusive and nondelegable control over the administration of an estate in its possession. * * * There

> can be no question, however, that *Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.* * * * What it did give is exclusive jurisdiction of the debtor and its property wherever located. * * * We think that the interest here involved is not part of the property of the debtor, and that the district court's assertion of *exclusive* jurisdiction was error." 336 U. S. 132, 142-43. (Italics ours.)

To the same effect is the recent case of *Nathanson* v. *N.L.R.B.*, 344 U. S. 25, 30, decided by this court three months ago, which cited and relied upon *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483-84.

In a supreme effort to make this case appear to be something different from that shown by the record, petitioners contend that the Court of Appeals affirmed a surrender of the paramount and exclusive jurisdiction of the bankruptcy court (Pet'n 13) and permitted the state court "to collect and distribute the assets" (Pet'n 14). The inference, of course, is that the assets referred to were assets of the bankruptcy estate.

The truth of the matter is that the subject matter of the state court proceedings was an action *in personam*—as distinguished from a proceeding *in rem*—and that the only funds collected and distributed by the state court were moneys paid by the father of the bankrupt to satisfy the liability of his son (R. 376-77, 351-52, 246). Said funds were not a part of the bankruptcy estate and were in no way available to the Trustee in Bankruptcy herein.

In these circumstances, the bankruptcy court, in the wise exercise of its discretion, elected not to interfere with the state court proceedings—as it had a right to do in the exercise of its paramount and exclusive jurisdiction—because no assets of the bankrupt's estate were involved in

that suit. This action conformed to the decisions above cited, in which this court recognizes that the exercise of discretionary powers by the bankruptcy court is not inconsistent with the paramount and exclusive jurisdiction of that court.

III.

RELEVANT AUTHORITIES SUSTAIN THE ACTION OF THE LOWER COURTS HEREIN.

On pages 8 and 9 of the answer of this respondent to the petition of the Elks (Docket #445) are collected the cases most analogous to the facts disclosed by this record. All of said cases support the action of the lower courts herein.

A. Dimock v. Revere Copper Co., 117 U. S. 559, is decisive of the issues herein.

In a procedural situation somewhat similar to the one presented by this record, this court held in *Dimock* v. *Revere Copper Co.* that bankruptcy proceedings did not bar a state court, which had acquired prior jurisdiction over the person and subject matter, from entering a valid judgment in the state court.

For obvious reasons, petitioners herein have failed to refer to or distinguish the *Dimock* case which this respondent believes to be decisive herein.

B. Cases cited by petitioners are inapplicable and irrelevant herein.

Petitioners cite only three decisions of this court in support of their argument concerning the mutually exclusive character of "discretionary powers" and "paramount and exclusive jurisdiction" of the bankruptcy court (*U.S.F. &*

G. Co. v. *Bray,* 225 U. S. 205, *New York* v. *Irving Trust Co.,* 288 U. S. 329, *Pepper* v. *Litton,* 308 U. S. 295), and are forced to admit (Pet'n 13-14) that the most recent decision of this court does not support their argument but recognizes the existence of a **discretionary power** in the bankruptcy court (*Nathanson* v. *N.L.R.B.,* 344 U. S. 25, 30, 97 L. ed. 13, 17 (Advance Sheets)).

None of the cases cited by petitioners involved a *solvent* bankrupt having no unpaid creditors, and a cursory examination of these cases discloses their inapplicability and irrelevancy herein.

In *U.S.F. & G. Co.* v. *Bray,* 225 U. S. 205, the state court, in proceedings filed **after** the bankruptcy, sought to affect and deal with funds in the possession of the Trustee in Bankruptcy. In the present case, the state court acquired jurisdiction **long prior** to the bankruptcy and did not in any manner seek to affect the bankruptcy estate or funds held by the trustee. It is apparent that the action of the trial court herein was **not** the *surrender of control over funds in the possession of the Trustee in Bankruptcy,* as was the action of the court in *U.S.F. & G. Co.* v. *Bray.*

New York v. *Irving Trust Co.,* 288 U. S. 329, involved a situation in which the State of New York sought "to participate in the assets of a bankrupt" (p. 330) and the question there involved was whether the state could establish its claim in bankruptcy. The inapplicability of this decision to the facts herein—where the state court judgment has been satisfied by a third party—and the judgment creditor did not seek "to participate in the assets of the bankrupt," is too apparent to merit further discussion.

Pepper v. *Litton,* 308 U. S. 295, involved the disallowance of a claim in bankruptcy and the administration of the bankrupt's assets by the bankruptcy court. No such situation is presented by the record herein.

In the final portion of their brief (pp. 14-18) petitioners discuss at length the case of *Brown* v. *O'Keefe,* 300 U. S. 598, which was cited in the opinion of the Circuit Court of Appeals (R. 426). Contrary to petitioners' contention that the Court of Appeals placed much emphasis on this case, it is apparent from a reading of the decision that the court merely referred to the case in explaining its decision on the prior appeal reported in 171 F. (2d) 159. The decision of the Court of Appeals sought to be reviewed was in no way dependent upon *Brown* v. *O'Keefe,* and the treatment of that case by the Court of Appeals does not warrant the consideration given it by petitioners. The complete answer to petitioners' argument concerning *Brown* v. *O'Keefe* is already in the record at pages 486 to 490, to which the attention of the court is directed if petitioners' argument assumes any importance herein.

The principal relevancy of *Brown* v. *O'Keefe* at this stage of the proceeding lies in the recognition therein by this court that Section 63(b) of the Bankruptcy Act (11 U. S. C. A., § 103), which provides for the liquidation of claims in such manner as the bankruptcy court may direct, invests that court "with *discretionary power* that can be fitted to the needs of varying situations" (300 U. S. 598, 605). This is directly contrary to petitioners' present contentions, and was the basis of the action of the lower courts herein.

CONCLUSION.

Because the petition herein is not limited to matters usually contained in petitions for certiorari, but also includes extended arguments relating to the *merits* of the action of the lower courts, respondent has included herein answers to all of such arguments. On this record, even if certiorari should be granted herein, the action of the lower courts would have to be affirmed.

Respondent respectfully submits that the Petition for Writ of Certiorari shold be denied because:

(1) Petitioners have failed to point out any conflict between the decisions of the Court of Appeals herein and decisions of this court or other Courts of Appeals.

(2) The choice between the method of terminating this bankruptcy, which was approved by the Court of Appeals, and the method contended for by petitioners is not of general importance or of great public interest.

(3) The bankrupt herein is solvent—with no unpaid creditors—and any decision on the merits would be of narrow and limited interest.

(4) Petitioners are, in reality, seeking a review of the decisions below on the sole ground that they are erroneous. *Magnum Import Co. v. DeSpoturno Coty,* 262 U. S. 159, 163.

Respectfully submitted,

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